No. 76-1703

In the Supreme Court of the United States

OCTOBER TERM, 1977

DURHAM HOSIERY MILLS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The *per curiam* decision of the court of appeals (Pet. App. 1a) is reported at 551 F. 2d 466. The Board's decision and order (Pet. App. 2a-11a) are reported at 221 NLRB 600.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 2, 1977. The petition for a writ of certiorari was filed on May 31, 1977.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1]On June 21, 1977, the court of appeals denied petitioner's petition for rehearing *en banc*. On July 12, 1977 the Chief Justice denied petitioner's application for a stay of mandate pending disposition of the petition for certiorari.

QUESTION PRESENTED

Whether the Board was required to hold an evidentiary hearing where petitioner did not controvert the facts alleged by the General Counsel, and these facts were legally sufficient to establish that petitioner was a successor employer, who had acquired the predecessor's business with knowledge that the union was the duly certified collective bargaining representative of the employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

STATEMENT

Danville Industries, Inc. ("Danville") is a Virginia corporation whose Danville Knitting Mills Division was engaged in the manufacture of knit goods at its Danville, Virginia plant (A. 13).[2] In May 1973, the Board conducted a secret ballot election at the Danville plant, resulting in the certification, on November 1, 1973, of the United Textile Workers of America, AFL-CIO ("the Union") as the collective bargaining representative of the production and maintenance employees (A. 14-15).[3]

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[2]"A." references are to the appendix to the briefs below; a copy has been lodged with the Clerk of this Court.

[3]Danville thereafter refused to bargain with the Union, which filed charges against Danville. On April 29, 1974, the Board, granting the General Counsel's motion for summary judgment, held that Danville had violated Section 8(a)(5) and (1) of the Act, and ordered it to bargain with the Union. *Danville Industries, Inc.*, 210 NLRB 307. On January 27, 1975, the Court of Appeals for the Fourth Circuit enforced the Board's order. *National Labor Relations Board* v. *Danville Industries, Inc.*, 510 F. 2d 966 (A. 10-20, 21-23).

On September 20, 1973, shortly before the Board certified the Union, petitioner Durham began negotiations for the purchase of Danville Knitting Mills. A tentative agreement was reached on October 27, 1973, and a final agreement on January 2, 1974 (Pet. App. 6a; A. 32). On April 4, 1975, after learning of the sale, the Board's Regional Office wrote to counsel for Durham requesting information on the details of the sale (A. 29-30). By letter of May 6, 1975, Durham replied that it had purchased all of the assets of Danville, had rehired all of the approximately 223 employees employed by Danville, and had retained the same supervisory personnel; that there was no hiatus in operation of the plant, and all customers of Danville had been retained; and that, at the time of the purchase, Durham was aware of the Union's certification (A. 31-33).

On May 19, 1975, the Union sent Durham a letter requesting an immediate bargaining meeting (A. 24). When no reply was received, the Union filed an unfair labor practice charge with the Board against Durham (A. 28). Thereafter, the Union sent Durham a second letter, which again went unanswered (A. 2, 26). Durham, however, advised the Board that it was refusing to recognize the Union, but denied that it had violated the Act (A. 3, 34).

On August 6, 1975, the Board's Regional Director issued a complaint alleging that Durham was Danville's successor, and that it had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union since June 24, 1975 (A. 35-38). Durham filed an answer, admitting, *inter alia*, the Union's certification as bargaining representative of the Danville employees and its purchase of the Danville facility (A. 40-41). Counsel for the General Counsel then filed a Motion for Summary Judgment with the Board, setting forth the sequence of events leading to Durham's refusal to bargain and also the details of Durham's purchase and takeover of the Danville facility, as

detailed in Durham's letter of May 6, 1975, a copy of which was attached to the Motion (A. 1-4). Durham, in an Amended Statement in Opposition to General Counsel's Motion for Summary Judgment, "stipulate[d] that the facts as alleged in the Motion for Summary Judgment are accurate," but contended that these facts "do not support the legal conclusion * * * that [the] Employer is a successor Employer," and that due process required an evidentiary hearing (A. 48-49).

The Board found that it was uncontroverted that Durham had continued, without interruption, the operations of Danville at the same location, utilizing the same work force under the same supervision, and that Durham was aware of the Union's certification at the time of the sale. The Board concluded that these admitted facts were sufficient to establish that petitioner was a successor employer and thus obligated to bargain, upon request, with the representative of the predecessor's employees. Accordingly, an evidentiary hearing was not required. The Board therefore granted the Motion for Summary Judgment, holding that Durham violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain (Pet. App. 4a-5a). The Board entered a bargaining order (Pet. App. 9a-11a). The court of appeals sustained the Board's findings and conclusions, and enforced its order (Pet. App. 1a).

ARGUMENT

In *National Labor Relations Board* v. *Burns International Security Services*, 406 U.S. 272, 278, 281, this Court held that a new employer is a successor employer bound by its predecessor's bargaining obligation where the bargaining unit continued to be "an appropriate one," a majority of the employees hired by the new employer were represented by a recently certified union, and the new employer "could not reasonably have entertained a good-faith doubt" of

that majority status. On the basis of information originally supplied by Durham, the Board found that all the above indicia of successorship were met here. Petitioner does not challenge the facts underlying the Board's conclusion, but contends that the Board's order nonetheless should not be enforced because the Board's failure to accord it an evidentiary hearing on the successorship question constituted a denial of due process. There is no substance to this contention.

"An essential prerequisite to the right to a hearing is something to be heard." *National Labor Relations Board* v. *Carolina Natural Gas Corporation*, 386 F. 2d 571, 574 (C.A. 4). "If there is nothing to hear, then a hearing is a senseless and useless formality." *National Labor Relations Board* v. *Air Control Products of St. Petersburg, Inc.*, 335 F. 2d 245, 249 (C.A. 5). Here, since there was no dispute as to the underlying facts concerning Durham's status as a successor employer, an evidentiary hearing would have been "a senseless and useless formality." Nor was the Board's procedure unauthorized by its rules. Those rules "provide adequate authority for the Board's transfer of proceedings to itself." *National Labor Relations Board* v. *Union Brothers, Inc.*, 403 F. 2d 883, 888 (C.A. 4). See 29 C.F.R. 102.50.[4]

Golden State Bottling Co. v. *National Labor Relations Board*, 414 U.S. 168 (Pet. 6-7), does not hold otherwise. The Court's reference to a hearing "to present evidence

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[4]The procedure followed by the Board in this case is consistent with that permitted by the Federal Rules of Civil Procedure. Rule 56(e), Fed. R. Civ. P., provides that, "[w]hen a motion for summary judgment is made and supported * * *, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices" (414 U.S. at 180) contemplates a situation where there is a question of fact concerning the question of successorship. There is no such question here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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